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No. 80-2026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1980

HOWARD BROWN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITIONER'S REPLY

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One reading the State's Brief in Opposition simply cannot avoid, or otherwise escape, being made aware of its lack of substance. Also, the fact that it would take this Court outside the Record in this case for what it views as facts relevant to this cause, shows a type of desperation that should be credited. For if the conviction in this case conformed with the requirements of due process, it would be unnecessary for the prosecutor to inform the Court that "petitioner also entered a plea of guilty to an unrelated drug case at the time of sentencing." And, that "petitioner has subsequently been arrested by Cleveland Police Officers and Federal Law Enforcement Agents for separate and distinct violations of both State and Federal Law" (Brief in Opposition, p. 2).

Stated another way, the artificial inclusion of the above-referred to facts in the State's response really borders on being insulting. There is simply no chance this Court would ever resolve a question as to whether an accused had a fair trial on the basis of his conduct after the trial under review.

I

What has been said above actually puts in focus the State's argument that the error involved in allowing the officers to testify as to the reliability of an unavailable informant whose actions were orchestrated by the officers involved.

Simply put, for the State to now say the evidence tending to show this person's lack of reliability was irrelevant to the issues at this trial or that, at best, its improper exclusion was harmless beyond a reasonable doubt, shows a surprising lack of depth. This is so because if the informant's reliability was totally irrelevant to the issues in the case, why then was it necessary for the State to prove through the officers the man was, if the officers' testimony was believed, reliable and fully creditable. Indeed, the fact that the State would argue to the Court that "the jury had the right to believe or disbelieve" (id., at 8) a nontestifying informant was reliable magnifies the critical point here.

This being so, to argue as the State does that the officers' testimony

showing the informant was reliable is conclusive proof such was the case makes sense only to this prosecutor. For only this prosecutor could argue an "informant's past activities were irrelevant to the proof of the State's case" (id., at 8-9), then willfully bombard the jury with evidence that the man was reliable.

II

The State's argument that the issues raised under this segment of the petition do not involve a "subsequent constitutional question" is a real cop out. The same is true of the absolutely ridiculous assessment of the evidence bearing on this point.

As to the State's argument that "it is not necessarily true that Bradford (the declarant) was unavailable as a witness" (id., at 11), the Record shows the trial court fully credited Bradford's assertion of the amendment. This fact then conclusively resolves any question as to availability.

Then we have the rather sophomoric argument that "no evidence was offered or proffered to show any corroborating circumstances indicating trustworthiness" (id., at 10). Here, of course, it cannot be that the credibility of the witness to the declarant's statements against penal interests that were offered to exculpate this petitioner did not weigh heavily in favor of probativeness and trustworthiness. The witness was an attorney, the mayor of a large suburban

community in the County, which is a relevant consideration bearing on his veracity. The fact that the declarant furnished a sworn affidavit to the same effect can hardly be overlooked. Also to be factored is the undeniable fact of the declarant's involvement in the offense then being tried. See United States v. Thomas, 571 F.2d 285, 290 (5th Cir. 1978).

At least this much seems certain -- the courts have yet to make the burden of corroboration on the defendant very high. See United States v. Benveniste, 564 F.2d 335, at 341-342 (9th Cir. 1977). Indeed, the fact that the court in Benveniste relied as heavily as it did on Chambers v. Mississippi, 410 U.S. 284, 302 (1973), emphasizes the shallowness of the State's argument.

CONCLUSION

In the Chambers case, this Court characterized the corroborating evidence "as well within the basic rationale of the exception for declarations against interest" (410 U.S., at 587). By comparison, the corroboration in this case provided by the integrity of the witness and the fact that the decedent had sworn to his evidence makes our case even stronger than Chambers. When this circumstance, in addition to the right of an accused to present evidence, is considered; the exclusion of evidence sought to be admitted here simply cannot be defended in law, logic or common sense.

Respectfully submitted,

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CONCLUSION

It is hereby certified that a copy of the foregoing Reply was mailed to John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, OH, 44113, this 9th day of July, 1981.

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